

REPUBLIC OF KENYA

COMMERCIAL HIGH COURT

AT MOMBASA

Civil Case 18 of 2004

**EAST AFRICAN POWER MANAGEMENT LIMITED.....
PLAINTIFF**

VERSUS

**WESTMONT POWER (KENYA) LTD.....
DEFENDANT**

RULING

This is an application by the plaintiff under Order 41 Rule 4(1) of the Civil Procedure Rules and sections 3A and 63 of the Civil Procedure Act for an order:

"THAT the order and for decision of Hon. Justice D. K. Maraga made herein on 15th July 2005 striking out the suit and lifting the attachment before judgments (sic) be stayed pending the hearing and determination of an appeal to the Kenya Court of Appeal lodged by the plaintiff against the said order and/or decision."

The application is based on the ground that prior to the striking out of the plaintiff's suit there was an attachment before judgment in place against the defendant's only asset within the jurisdiction of this court namely a Power and Fuel Barge which was necessitated by the fact that the defendant intended to sell it so as to defeat the enforcement of any decree which may be passed against it in this suit.

Arguing the application for the plaintiff Mr. Okongo submitted that the defendant has wound up its business in Kenya and if a stay is not granted the defendant will most likely dispose of the Power and Fuel Barge, its only asset within the jurisdiction of this court thus rendering the plaintiff's appeal nugatory. As security he said the plaintiff is ready and willing to comply with any order that the court will deem fit to make in that regard.

For his part Mr. Shah, Counsel for the defendant, submitted that this court having struck out the plaintiff's suit there is nothing to stay and this application is therefore untenable. He said that just because the plaintiff has made a claim does not mean that the defendant's assets should be frozen. He further submitted that if a stay is granted it is the defendant who will suffer loss as the appeal to the Court of Appeal will take 2 to 3 years to be heard and in the meantime the plaintiff will have this suit heard as though it had not been struck out. According to Mr. Shah Order 41 Rule 4 applies to stay only monetary decrees.

Starting with Mr. Shah's last point I wish to state that Order 41 Rule 4 should not be given the restricted application to monetary decrees only. In my view it should apply to any decree or order the execution or implementation of which will render nugatory the applicant's appeal. However convinced or sure it may be of its decision a trial court should always bear in mind the fact that it may very well be overruled on appeal. And if stay is not granted the appeal will have been rendered nugatory it should always maintain the status quo.

In this case it is not in dispute that the defendant has wound up its operations in this country and that its only asset within the jurisdiction of this court is its Fuel and Power Barge lying at Kipevu in Mombasa. The defendant did not contend otherwise. If a stay is not granted and the defendant disposes the Fuel and Power Barge it appears to me that the plaintiff is likely to suffer substantial loss. However as this is not a case of a decree obtained after a hearing I grant a stay limited only to maintaining the order for the attachment before judgment of the defendant's Fuel and Power Barge on condition that, as security for any loss the defendant may suffer, the plaintiff deposits in an interest bearing account in the joint names of the advocates for the parties a sum of USD 442,641.23 being half of the amount claimed by it in this suit or its equivalent within thirty

(30) days of the date hereof failing which its application for stay shall stand dismissed with costs.

DATED and delivered this 30th day of September 2005.

D. K. MARAGA

JUDGE